Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition for Expedited Rulemaking	)	
for Operations Support Systems	)	
of LCI and CompTel	)	
	)	
Implementation of the Local	)	CC Docket No. 96-98
Competition Provisions in the	)	RM 9101
Telecommunications Act of 1996	)	

REPLY COMMENTS OF TIME WARNER COMMUNICATIONS HOLDINGS INC.

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ATTORNEYS FOR TIME WARNER
COMMUNICATIONS HOLDINGS INC.

July 30, 1997

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REPLY COMMENTS OF TIME WARNER COMMUNICATIONS HOLDINGS INC.

Time Warner Communications Holdings Inc. ("TWComm") hereby files these reply comments in response to the above-captioned Petition for Rulemaking.[1]

I. INTRODUCTION AND SUMMARY.

The comments filed in this proceeding demonstrate the strong support among competitive LECs ("CLECs") for an OSS rulemaking proceeding. Those commenters have demonstrated the need for OSS benchmarks and measures that are adequate to sustain widespread local entry. There is also substantial agreement that adequate penalties for violations of the rules are essential to their success. The state commenters and NARUC also support national coordination on the issue of OSS. Moreover, the very weakness of the arguments offered by ILECs in opposition to the Petition for Rulemaking only further demonstrates its appropriateness.

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[1] See Petition for Expedited Rulemaking By LCI International Telecom Corp. ("LCI") and Competitive Telecommunications Association ("CompTel") filed in CC Docket No. 96-98 (May 30, 1997) ("Petition" or "Petition for Rulemaking").

While the merit of the Petition is therefore well-established, the recent Eighth Circuit decision overturning many of the Commission's interconnection rules requires a reassessment of the Commission's jurisdiction over OSS. These reply comments therefore focus primarily on this issue. In fact, as demonstrated below, even under the Eighth Circuit decision, the Commission has the jurisdiction to set benchmarks, measures and standards for OSS. Moreover, Sections 253, 271 and 10 of the Communications Act offer the Commission independent jurisdiction to establish and enforce OSS rules. Even if the Commission chooses not to exercise the full extent of its jurisdiction in this regard, there is ample opportunity for the Commission to enforce national OSS rules in cooperation with the states.

II. THE COMMISSION HAS THE AUTHORITY TO ESTABLISH AND ENFORCE NATIONAL OSS RULES.

In its recent decision in Iowa Utils. Bd. v. FCC,[2] the Eighth circuit held that the Commission has the authority to define the nature of ILEC unbundling obligations.[3] Indeed, the Eighth Circuit upheld several of the Commission's rules implementing Section 251(c)(3), including the designation of OSS as an unbundled element.[4] Under the Eighth Circuit decision,

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2 1997 WESTLAW 403401 (8th Cir. 1997).

3 See id. at *4 n.10 (listing unbundled network elements as an area over which Congress granted the Commission explicit jurisdiction).

4 See id. at **19-21.

therefore, the Commission has the jurisdiction, at the very least, to set national OSS benchmarks, measures and standards. The decision requires further analysis, however, as to whether the Commission has the jurisdiction to enforce those rules.[5]

As explained below, several provisions in the Communications Act provide the Commission with the authority to institute federal complaint and enforcement procedures in support of national OSS rules. Section 253, for example, grants the Commission authority over all ILECs and Section 271 permits OSS regulation and enforcement for the BOCs. In addition, Section 10 grants the Commission independent jurisdiction over OSS.[6]

A. The Commission Has Preemption Power Under Section 253(d) Of The Communications Act.

Section 253(d) permits the Commission to preempt state OSS requirements -- including those in interconnection agreements -- that would prohibit an entity's ability to provide any interstate

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5 The need for such further analysis arises from the Eighth Circuit's holding that only states and federal district courts have the authority to enforce interconnection agreements. See id. at **14-15. It is important to note, however, that the Eighth Circuit decision appears not to preclude the enforcement of general FCC enforcement rules (i.e., those outside of the interconnection agreement context) established pursuant to specifically delegated authority under Section 251. Thus, in addition to the arguments presented below, the Commission should consider the point that the Eighth Circuit decision leaves open the door to FCC enforcement of OSS rules outside of the interconnection agreement context.

6 While the following discussion deals with the Commission's jurisdiction to enforce OSS rules by itself, as indicated in Section IV below, the Commission could also enforce OSS rules in cooperation with the states.

or intrastate telecommunications services. By its terms, Section 253(d) empowers the Commission to preempt any state or local "statute, regulation, or legal requirement" that prohibits any entity's ability to provide interstate or intrastate telecommunications services.[7] The use of the phrase "or legal requirement" was intentional as shown by Congress' use of the phrase in Section 253(a), (d) and in the Conference Report.[8] Those multiple references make it evident that Congress intended for the Commission's preemption powers to encompass more than statutes and regulations.

The "legal requirement" phrase brings arbitration decisions and enforcement of state-approved contracts within the Commission's preemption powers under Section 252(d)(3). Either action would impose a state legal requirement on an ILEC. If any such decision established OSS requirements that effectively prevent a new entrant from providing telecommunications services using either resale, independent switching facilities or through unbundled elements (or some combination of these), the Commission may preempt the legal requirement in question under Section 253(d).

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[7] See 47 U.S.C. § 253(d). The Eighth Circuit recognized that the Commission has preemption authority pursuant to Section 253(d). See Iowa Utils. Bd., 1997 WESTLAW 403401 at *18.

[8] See S. Conf. Rep. No. 104-230 at 126-127 (1996) ("Conference Rep.").

It should be emphasized that the ability to provide telecommunications services must mean the ability to enter the market on a commercially viable scale. The ability to serve only a handful of customers effectively prevents a new entrant from providing telecommunications services and therefore fails the standard of Section 253(a). In this way, inadequate access to OSS could limit entry in a way that would effectively bar a new entrant from providing competitive local services without preventing entry altogether.[9]

In addition, the Commission has the authority under Section 253(d), alone or in connection with Sections 4(i), 201(b), and 303(r), to promulgate base performance standards or guidelines (floors) regarding interconnection and unbundled access to network elements which must be included in any arbitration agreement. That is, the Commission could conclude that, unless such standards are met, any entity would essentially be prohibited from providing interstate or intrastate telecommunications services.

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9 See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket Nos. 96-98, 95-185, First Report and Order at ¶ 516 (finding that "the massive operations support systems employed by incumbent LECs, and the information such systems maintain and update to administer telecommunications networks and services, represent a significant potential entry barrier").

B. Section 271 Permits The Commission To Enact And Enforce OSS Performance Standards For All BOCs.

Pursuant to Section 271, the Commission also has the authority to promulgate and enforce OSS standards for BOCs. In accordance with Section 271, all BOCs seeking interLATA authority must apply to the Commission which is given plenary authority to grant or deny such applications.[10] As part of its review, the FCC must find that the BOC has "fully implemented" the competitive checklist (or that its SGAT offers all checklist items) and that the grant of the application "is consistent with the public interest."[11] In the context of Section 271, subsections (c) and (d)(3) make plain that the phrase "fully implemented" refers to the status of the applicant BOC's interconnection agreements, as they pertain to the competitive checklist and other requirements of Section 271. In short, the Commission must decide if the applicant BOC has carried out those portions of its interconnection agreements relating to the checklist, including the provision of unbundled network elements such as OSS.

In connection with its authority under Section 271(d)(3), the Commission may issue performance standards for unbundled elements such as OSS. Under Section 271(c)(2)(B)(ii), the applicant BOC must provide "[n]ondiscriminatory access to network

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10 See 47 U.S.C. §§ 271(b)(1),(d)(1) & d(3).

11 See 47 U.S.C. § 271(d)(3).

elements" pursuant to Sections 251(c)(3) and 252(d)(1). As noted, the Eighth Circuit has upheld the Commission's authority to include OSS in the definition of network elements. Pursuant to Section 271(d)(3), the Commission has the exclusive power to determine if Section 271(c)(2)(B)(ii) and other parts of the checklist have been fully implemented, including what benchmarks and standards must be met.

The promulgation of performance standards is also justified under Section 271(d)(3)(C) which states that the Commission may not grant any BOC application unless the application is consistent with the public interest. It is well-established that the public interest is a "supple instrument" granting broad powers to its wielder.[12] The Supreme Court has held that the Commission's public interest authority confers "wide discretion and calls for imaginative interpretation."[13] The creation of performance standards certainly is the type of imaginative interpretation sanctioned by the Supreme Court.

With respect to enforcement procedures, the Commission's power is express. Section 271(d)(6)(A) gives the FCC enforcement authority with respect to a BOC's failure to meet the conditions required for Section 271 authority once the FCC has approved the BOC's Section 271 application. Section 271(d)(6)(A) explicitly gives the Commission the power to order the deficiency corrected,

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12 See FCC v. WNCN Listeners Guild, 450 U.S. 582, 593 (1981).

13 See FCC v. RCA Comm., Inc., 346 U.S. 86, 90 (1953).

impose a penalty pursuant to Title V or suspend or revoke the BOC's Section 271 approval. Section 271(d)(6)(B) authorizes the FCC to "establish procedures for the review of complaints concerning failures by [BOCs] to meet conditions required for [Section 271 authority]." Thus, pursuant to Section 271(d)(6), the Commission has authority to ensure that BOCs continue to comply with the requirements of Section 271. That authority extends to a BOC's compliance with the provision of unbundled network elements such as OSS as part of the checklist contained in Section 271(c).

The explicit grants of authority just described mean that Section 2(b) does not confine the Commission's power under Section 271. Furthermore, state PUCs have only a limited role in Section 271: they are permitted to consult with the Commission as to the BOC's compliance with the checklist, but the Commission is not required to give any special deference to the PUC as it must to the Justice Department.[14] The PUCs' minimal role is highlighted by the fact that Section 251(d)(3), which seeks to preserve State PUC authority from FCC preemption, does not apply to Commission actions under Section 271.[15]

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[14] Compare 47 U.S.C. § 271(d)(2)(A) (requiring that "substantial weight" be given to Justice Department evaluation) with 47 U.S.C. § 271(d)(2)(B) (no deference language included with State PUC consultation provision).

[15] Section 251(d)(3)(C) limits the agency's preemption powers only when the Commission is acting under Part II, "which consists of sections 251-261." See Iowa Utils. Bd., 1997 WESTLAW 403401 at *17. Section 271 is in Part III and is therefore immune to Section 251(d)(3).

As discussed above, Sections 4(i), 201(b) and 303(r) confer ancillary authority where, as here, the Commission possesses express regulatory powers. Because those sections permit the Commission to go a bit beyond the express powers delegated to it, they, in conjunction with Section 271, serve as yet another basis for the agency to promulgate and enforce performance standards on BOCs.

C. Section 10 Of The Communications Act Requires The Commission To Create And Enforce OSS Obligations For All ILECs.

Section 10 of the Communications Act[16] gives the Commission both the power and the obligation to implement and enforce Section 251(c) and Section 271.[17] The Commission has already determined -- and been affirmed by the Eighth Circuit -- that OSS is a network element within the meaning of Section 251(c)(3).[18] Thus, pursuant to Section 10, the Commission has the authority and the responsibility to ensure that OSS is supplied properly by ILECs. That conclusion is supported by the plain language and legislative history of Section 10.

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16 See 47 U.S.C. § 160

17 The arguments concerning Section 251(c) therefore apply with equal force to Section 271.

18 See Iowa Utils. Bd., 1997 WESTLAW 403401 at **19-20 (affirming Commission's conclusion that OSS is a network element that must be unbundled).

1. The Language Of Section 10 Requires The Commission To Define And Enforce The Requirements Of Section 251(c).

The interpretation of a statute begins with its plain meaning.[19] In relevant part, Section 10 provides as follows:

> (a) REGULATORY FLEXIBILITY: Notwithstanding Section 332(c)(1)(A)[20] of this Act, the Commission shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services in any or some of its or their geographic markets, if the Commission determines that --
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> (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with the telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
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> (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
>
> (3) forbearance from applying such provision or regulation is consistent with the public interest.
>
> (b) COMPETITIVE EFFECT TO BE WEIGHED. In making the determination under subsection (a)(3), the Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services. * * *
>
> (c) PETITION FOR FORBEARANCE. Any telecommunications carrier or class of telecommunications carriers, may submit a petition to the Commission requesting that the Commission exercise the authority granted under this section with respect to that carrier . . . or any service offered by that carrier or carriers. * * *

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[19] See Pennsylvania Public Welfare Dept. v. Davenport, 495 U.S. 552, 557 (1990).

[20] Section 332(c)(1)(A) permits the Commission to exempt commercial mobile services from certain provisions of Title II.

(d) LIMITATION. Except as provided in section 251(f), the Commission may not forbear from applying the requirements of section 251(c) or 271 under subsection (a) of this section until it determines that those requirements have been fully implemented.

(e) STATE ENFORCEMENT AFTER COMMISSION FORBEARANCE. A State commission may not continue to apply or enforce any provision of this Act that the Commission has determined to forbear from applying under subsection (a).[21]

The "may not forbear" language in Section 10(d) requires that the Commission apply Sections 251(c) and 271 until the agency determines that those sections have been fully implemented. It is of little consequence that Congress chose to bequeath the Commission's authority through a "may not forbear . . . until" clause rather than a clause stating that the agency "must apply the statute until . . . ." The two clauses have the same meaning.[22] Thus, until the Commission determines that Sections 251(c) and 271 have been fully implemented, the meaning

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[21] 47 U.S.C. § 160 (emphasis added).

[22] Congress granted the Commission preemption powers in a similar fashion under Section 261(c) which states:

> Nothing in this part precludes a State from imposing requirements on a telecommunications carrier . . . that are necessary to further competition in the provision of telephone exchange service or exchange access as long as the State's requirements are not inconsistent with this part or the Commission's regulations to implement this part.

See 47 U.S.C. § 261(c)(emphasis added).

That provision permits the Commission to preempt State regulations inconsistent with the Commission's implementing rules. See Iowa Utils Bd., 1997 WESTLAW at *18 (holding that Section 261(c) requires that certain state rules be consistent with those of the Commission).

of the "may not forbear" command is clear: the Commission must apply Sections 251(c) and 271.[23]

Congress' use of the term "apply" in Section 10(d) signals that the Commission was to have a major role in shaping and enforcing Section 251(c). As defined by Webster's Seventh New Collegiate Dictionary (1965), "apply" means "1a: to put to use esp. for some practical purpose . . . 2: to employ diligently or with close attention . . . ."[24] In order for Section 251(c)'s requirements to be "put to use" and "employ[ed] diligently", the Commission must be able to construe and enforce those requirements. In other words, Congress' mandate that the Commission not forbear from applying Section 251(c) means that the Commission must define and enforce that section by, for example, the promulgation and enforcement of OSS performance standards. Anything less would constitute an abdication of the Commission's statutory obligations to employ diligently and put into use the requirements of Section 251(c).

Moreover, Section 10(d) expressly grants the Commission plenary authority to decide if and when "the requirements of"

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[23] Section 10(d) is entitled "Limitation." That title refers back to the title of subsection (a), "Regulatory Flexibility." In other words, Section 10(d) is a limit on the Commission's flexibility to forbear from applying the Act and the agency's own regulations.

[24] The Eighth Circuit referred to Webster's in upholding the Commission's interpretation of the term "impair" in Section 251(d)(2)(B). See, Iowa Utils. Bd., 1997 WESTLAW 403401 at *28.

Section 251(c) have been fully implemented. Subsections 10(a) and (b) instruct the Commission that in making its Section 10(d) decision, it must determine that the "charges, practices, classifications, or regulations by, for, or in connection" with the telecommunications carrier(s) or service(s) in question are just and reasonable and that enforcement is not needed to protect consumers or promote competition. Since it is up to the Commission to decide if Section 251(c)'s "requirements" have been fully implemented as per Sections 10(a) and (b), it follows that the Commission has the authority to determine what those requirements are, i.e., to define charges, practices, etc.

The Commission's enforcement authority -- the ability to hear complaints, etc. -- is exhibited in the language of Section 10. Under Section 10(a)(1)-(3), full implementation (the prerequisite for forbearance) means that: (1) "enforcement of [a] regulation or provision is not necessary" to ensure that the telecommunications carrier(s) or service(s) in question are "just and reasonable and are not unjustly or unreasonably discriminatory"; (2) "enforcement" is not needed to protect consumers; and (3) forbearance is consistent with the public interest. Section 10(b) informs the public interest determination, providing that in determining whether forbearance is in the public interest, the "Commission shall consider whether forbearance from enforcing the provision or regulation" will promote competition. Thus, "enforcement" is an integral part of all three of the findings required for the Commission to forbear.

Since the Commission is obligated under Section 10(d) to apply Section 251(c) until it finds that enforcement is unnecessary, it follows that the Commission has enforcement authority with respect to Section 251(c).[25]

An additional basis for the Commission to promulgate and enforce performance benchmarks, measures and standards is through Section 10 in conjunction with Sections 4(i), 201(b), and 303(r) of the Communications Act. Those Sections are applicable where, as here, Congress has expressly granted authority to the Commission.[26] They permit the Commission to "stray a little way beyond the apparent boundaries of the Act - to the extent necessary to regulate effectively those matters already within [the Act's] boundaries."[27] Thus, those sections -- in conjunction with Section 10(d) -- provide yet another basis for the Commission to create and enforce OSS standards under Section 251(c).

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25 Similar reasoning was used in Iowa Utils. Bd. in which the court held that the State Commissions' authority to accept or reject interconnection agreements "necessarily carries with it the authority to enforce the provisions of [the] agreements." See id. at *14.

26 See id. at *4 (Sections 4(i) and 303(r) "supply the FCC with ancillary authority to issue regulations that may be necessary to fulfill its primary directives contained elsewhere in the statute").

27 See North American Telecom. Ass'n v. FCC, 772 F.2d 1282, 1292 (7th Cir. 1985). See also Nader v. FCC, 520 F.2d 182, 204 (D.C. Cir. 1975)(holding that Section 4(i) allowed the Commission to prescribe a rate of return for AT&T even though the Act made no mention of any such rate of return authority).

2. The Legislative History of Section 10 Demonstrates Congress' Desire For The Commission To Apply and Enforce Section 251(c).

The legislative history shows that Congress deliberately chose Section 10 as one vehicle for the Commission's authority to regulate under Section 251(c). The Conference Report, which is the "most persuasive evidence of Congressional intent" after the statute itself,[28] states that "[n]ew subsection (d) provides that the Commission may not forbear from applying the requirements of new section 251(c) or 271 until the Commission determines that those requirements have been fully implemented."[29] This language indicates that Congress wanted the Commission to apply Section 251(c)'s requirements.

Further proof of Congress' sentiment is its rejection of the House bill[30] which would have allowed the Commission to forbear from applying the requirements of what is now Section 251(c) in favor of the Senate bill[31] which did not allow such forbearance until the agency determined that the section had been fully

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28 See Sutherland Statutory Construction at § 48.08.

29 Conference Rep. at 185.

30 See H.R. 1555, 104th Cong., 1st Sess. § 103 (1995) (as reported by the Committee on Commerce, adding new section 230 to the Act).

31 See S. 652, 104th Cong., 1st Sess. § 303 (1995) (as reported by the Committee on Commerce, Science, and Transportation, adding new section 260 to the Act); S. Rep. No. 23, 104th Cong., 1st Sess. 50 (1995).

implemented. Such rejection demonstrates that Congress intended for the Commission to have authority over Section 251(c).[32]

3. The Commission's Authority Over Section 251(c) Does Not Conflict With Iowa Utils. Bd. Or Section 2(b); The Commission Therefore May Preempt Inconsistent State Regulations.

The Commission's jurisdiction under Section 10 was not before the Eighth Circuit. Indeed, the court expressly stated that it was not addressing the scope of the Commission's jurisdiction under Section 10.[33] Thus, the court's conclusions that (1) the Commission's authority under Section 251 was limited to Subsections (b)(2), (c)(4)(B), (d)(2), (e) and (g) of Section 251 [34] and (2) enforcement of interconnection agreements was solely for the states and federal district courts[35] were made without reference to the agency's powers under Section 10.

In light of the express grant of authority to the Commission to "apply" the "requirements" of Section 251(c), the Commission has the power to preempt inconsistent state regulations.[36] That

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32 This conclusion is consistent with the Eighth Circuit's use of legislative history in Iowa Utils. Bd. See 1997 WESTLAW at *6 n.17 & *12 (using Congress' rejection of Senate or House bills to support the court's conclusions).

33 See id. at *4 n.11 ("We decline to address [the Commission's authority under Section 10] as it was not raised in the parties' opening briefs").

34 Id. at *4.

35 Id. at *14.

36 Id. at *17 (Commission has preemption powers under Section 251 where "Congress has expressly called for the FCC's participation").

authority does not run afoul of Section 2(b) given Section 10(d)'s express delegation to the Commission to apply Section 251(c).[37] Moreover, Section 10(a) permits the Commission to forbear from applying any regulation or provision of the Act to a telecommunications carrier or carriers "in any or some of its geographic markets." Such markets obviously include an entire state or portions of a state. Further, where forbearance occurs, Section 10(e) prohibits PUCs from enforcing the preempted provision. Thus, Section 10 is the type of unambiguous command permitting FCC regulation over matters contained in Section 251(c).

III. NATIONAL OSS RULES SHOULD ESTABLISH FUNCTIONAL CRITERIA THAT ACCOUNT FOR THE NEEDS OF ALL CLECS.

The national OSS rules must establish benchmarks, measures and standards that account for the needs of all CLECs, including those that provide their own independent switching. While the Petition did not account for the needs of these facilities-based carriers, several commenting parties, including CompTel and LCI, support TWComm's request that the scope of this proceeding encompass the needs of all CLECs.[38] As explained in TWComm's initial comments, this means ensuring that standards apply to interim number portability and trunks for the exchange of

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37 Id. at *6 (Congress must expressly delegate authority over intrastate services to the Commission in order to escape the reach of Section 2(b)).

38 See Comments of CompTel at 7; Comments of LCI at 7; Comments of Teleport at 6-7.

traffic. In addition, it means requiring ILECs to support manual OSS interfaces in addition to any electronic interfaces that may be developed.

Furthermore, the primary purpose of national OSS rules should be to establish functional benchmarks for performance. These functional criteria, for example setting timeframes for performance upon specific triggers, should accommodate differences in ILEC OSS systems.[39] The FCC should not try to set specific technical standards, although it may be appropriate to mandate a deadline by which those standards should be adopted. When industry technical standards are adopted by the relevant standard-setting group, the national OSS rules should mandate that all ILECs comply with those standards. In this way, the OSS rules will complement the current industry efforts to set standards.

IV NATIONAL OSS RULES MUST INCLUDE ADEQUATE ENFORCEMENT PROVISIONS.

As explained by many parties including TWComm,[40] OSS rules will be effective only if adequate enforcement measures are

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39 This is the sound approach the Commission adopted in mandating technically feasible long term number portability. The Commission set functional criteria rather than specific technical standards. See Telephone Number Portability, CC Docket No. 95-116, RM 8535, First Report and Order at ¶¶ 38-63 (released July 2, 1996), modified on reconsideration, Telephone Number Portability, First Memorandum Opinion and Order on Reconsideration at ¶ 19 (released March 11, 1997).

40 See Comments of ALTS at 16-17; Comments of CompTel at 6-7; Comments of LCI at 9-10; Comments of MCI at 10-12; Comments of AT&T at 29-33.

adopted. Such measures could be adopted by the FCC alone or in cooperation with the states. In either case, the enforcement measures must be designed to limit the opportunity for ILEC delay and to reduce the cost to both CLECs and regulators of enforcement.

First, ILECs must be required to submit regular reports to regulators and CLECs (subject to appropriate confidentiality restrictions) on their compliance with the applicable rules. There must also be an opportunity for regulators and, where appropriate, CLECs to perform audits of the ILEC reporting practices.

Second, remedies for ILEC rule violations should be largely pre-set according to remedial guidelines. To the extent possible, case-by-case compensation/penalty determinations should be avoided. This is the approach the Commission has adopted for implementing Section 503(b) of the Act,[41] a provision pursuant to which the Commission could set specific monetary damages for OSS.[42] Thus, each OSS rule would have an associated penalty (injunctive as well as financial) that is significant enough to

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41 See The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines, CI Docket No. 95-6, Report and Order (released July 28, 1997) (establishing pre-set penalties for defined violations).

42 Section 503(b) grants the Commission the authority to penalize common carriers up to $100,000 per day in fines for violations of the Communications Act. See 47 U.S.C. § 503(b).

deter and penalize severely violations of the OSS rules. Repeated violations should result in increased penalties. Although the Commission should also retain the discretion to depart from the penalty guidelines where special circumstances warrant, [43] it should do so rarely. The OSS rules must be simple and predictable to be effective.

Finally, an expedited complaint procedure should be established to enable CLECs to raise specific complaints before regulators without incurring the time and expense of litigation. After a bona fide complaint is submitted by a CLEC regarding an ILEC failure to comply with a benchmark, measure or standard, the ILEC must bear the burden of proving that it has complied with the requirement. Any exceptions to this rule need to be very carefully considered. Claims of technical infeasibility should be all but impossible to sustain, since the adoption of national rules will be based on a finding of technical feasibility.

The combination of national rules (obviating case-by-case determinations of technical feasibility), pre-set damages (obviating, for example, the need to determine consequential damages) and expedited complaint proceedings in which ILECs bear the primary burden of proof will limit the cost of OSS dispute

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[43] For example, Section 503(b) requires that the Commission consider the "nature, circumstances, extent and gravity of the violation." See 47 U.S.C. § 503(b)(2)(D). With respect to the violator, Section 503(b) requires that the Commission consider "the degree of culpability, any history of prior offenses, ability to pay and such other matters as justice may require." Id.

resolution. Such an approach will also provide ILECs a greater degree of predictability in the process.

V. PARTIES OPPOSED TO AN OSS RULEMAKING HAVE OFFERED NO SOUND BASIS FOR THEIR POSITION.

The ILECs that oppose an FCC rulemaking to establish national OSS rules offer little of substance in support of their position. Their central arguments are addressed below.

Some ILECs argue that national rules are unnecessary since full access to OSS is being provided pursuant to interconnection agreements.[44] TWComm's and other CLECs' experience have demonstrated that this is simply not so. CLECs lack the bargaining power to negotiate adequate access and enforcement provisions in interconnection agreements. Even where those terms are included in agreements, ILECs make claims of technical infeasibility that neither CLECs nor regulators have adequate information to refute.[45] Moreover, most CLECs, including TWComm, do not have the resources to contest each violation of their interconnection agreements. The result is inadequate OSS access, which is of course just what the ILECs want.

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[44] See Comments of Ameritech at 7-13; Comments of Bell Atlantic and NYNEX at 7-9; Comments of BellSouth at 4-14; Comments of GTE at 7-16

[45] Thus, GTE's assertion that ILECs have the incentive to meet OSS demands because of penalty provisions in interconnection agreements is unfounded. See Comments of GTE at 13-14. Because of the technical nature of disputes regarding OSS access, these penalty provisions, even where adequate, are essentially unenforceable without benchmarks and measures.

Nor is it any answer to assert, as Ameritech does, that aggrieved CLECs may seek relief with state regulators and federal district courts.[46] Many states have done a great deal to advance competitive access to ILEC OSS systems. But as mentioned, the state commenters in this proceeding acknowledge the benefits of national guidance on these issues. National rules will ensure access in all states, not just those where regulators are especially effective, and will lower the costs of entry for national CLECs such as TWComm. The alternative, a patchwork of OSS rules modified by case-by-case review by federal district courts, would be unworkable and expensive.

Finally, several ILECs argue that national OSS standards will fail to take into account differences in underlying ILEC legacy systems and would ignore state-specific service quality requirements.[47] But this should not be the case. If, as suggested above, functional criteria are mandated by regulators and technical standards are imposed only when they are adopted by the industry, individual ILECs should be able to comply with the OSS rules.

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46 See Comments of Ameritech at 12-13.

47 See Comments of Bell Atlantic and NYNEX at 4-5; Comments of SNET at 5-7.

VI. CONCLUSION

For the reasons set forth above, TWComm respectfully requests that the Commission grant the immediate relief requested in the LCI/CompTel Petition for Rulemaking and initiate an expedited rulemaking on national benchmarks, measures and standards for OSS subject to the modifications described herein as well as those described in TWComm's comments.

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